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IN THE

# Supreme Court of the United States

October Term, 1995

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KANSAS PUBLIC EMPLOYEES
RETIREMENT SYSTEM,

*Petitioner,*

*v.*

ESTATE OF FRANK MORGAN, SHERMAN DREISESZUN,
LELAND GERHART, I. I. OZAR, RAYMOND GIFFORD,
HARRY S. JONAS, ESTATE OF RALPH E. KIENE,
RANDALL M. NAY, TONY SALAZAR, AND PHILIP PISTILLI,

*Respondents.*

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ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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December 5, 1995

## QUESTIONS PRESENTED

1. Whether 12 U.S.C. § 1441a(*l*)(3)(A) is a removal venue provision, granting the Resolution Trust Corporation a choice of three federal venues when it becomes a party to state-court litigation but leaving untouched the original forum's choice-of-law principles, or instead whether Section 1441a 1441a(*l*)(3)(A) must be construed to produce "the rather startling conclusion that one might 'get a change of law as a bonus for a change of venue,'" *Van Dusen v. Barrack*, 376 U.S. 612, 636 (1964) (citation omitted).

2. Whether a federal appellate court's decision to disregard, and thus render a nullity, a state legislature's expressly retroactive lengthening of the statute of limitations applicable to pending lawsuits by its agency, in order to protect the assets of the state-run public employee retirement fund, so far departs from the court's obligation to interpret a state statute as would the highest court of that state as to call for the exercise of this Court's supervisory power.

## RULE 29.1 STATEMENT

Petitioner, the Kansas Public Employees Retirement System, is "a body corporate and an instrumentality of the State of Kansas." K.S.A. § 74-4903. It has no parent company or subsidiary.

# TABLE OF CONTENTS

QUESTIONS PRESENTED ..... i

RULE 29.1 STATEMENT ..... ii

TABLE OF AUTHORITIES ..... iii

OPINIONS BELOW ..... 1

JURISDICTION ..... 1

STATUTORY PROVISIONS INVOLVED ..... 1

STATEMENT OF THE CASE ..... 2

REASONS FOR GRANTING THE WRIT ..... 8

CONCLUSION ..... 14

## TABLE OF AUTHORITIES

*Cases* *Pages*

*Eckstein v. Balcor Film Investors*, 8 F.3d 1121 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 883 (1994) ..... 9
*Eakes v. Hoffman-LaRoche, Inc.*, 552 P.2d 998 (Kan. 1976) . 13
*Elliot v. Lochnane*, 1 Kan. 126 (1862) ..... 13
*Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) ..... 9
*Ferens v. John Deere Co.*, 494 U.S. 516 (1990) ..... *passim*
*Harding v. K.C. Wall Products, Inc.*, 831 P.2d 958 (Kan. 1992) 6
*Huddleston v. Dwyer*, 322 U.S. 232 (1944) ..... 13
*In re Korean Air Lines Disaster*, 829 F.2d 1171 (D.C. Cir. 1987) ..... 10
*In re United Mine Workers of America Employee Benefit Plans Litigation*, 854 F. Supp. 914 (D.D.C. 1994) ..... 11
*King v. Order of United Commercial Travelers of America*, 333 U.S. 153 (1948) ..... 13
*Matter of 5300 Memorial Investors, Ltd.*, 973 F.2d 1160 (5th Cir. 1992) ..... 11, 12
*Menowitz v. Brown*, 991 F.2d 36 (2d Cir. 1993) ..... 10
*State ex rel. Stephan v. GAF Corp.*, 747 P.2d 1326 (Kan. 1987) 3
*State v. Keeley*, 694 P.2d 422 (1985) ..... 13
*Stevenson v. City Council*, 781 P.2d 689 (Kan. 1989) ..... 13
*Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988) ..... 9, 10
*Sweeny v. Resolution Trust Corp.*, 16 F.3d 1 (1st Cir. 1994) . 12
*Todd v. Kelly*, 837 P.2d 381 (Kan. 1992) ..... 13
*Van Dusen v. Barrack*, 376 U.S. 612 (1964) ..... *passim*

***Statutes and Rules***

12 U.S.C. § 1441a(*l*) ..... *passim*
28 U.S.C. § 1292(b) ..... 7
28 U.S.C. § 1404(a) ..... 4, 8-12
28 U.S.C. § 1407 ..... 10
28 U.S.C. § 2106 ..... 13
Kans. Stat. Ann. §§ 60-512, 60-513, 60-521 ..... 3
Kans. Stat. Ann. § 60-522 ..... *passim*
12 C.F.R. § 545.121 ..... 3
Sup. Ct. Rule 10.1(a) ..... 13

## OPINIONS BELOW

The decision of the court of appeals (Appendix ("App."), *infra*, 1a-16a) is reported at 61 F.3d 608. The orders and bench opinions of the district court (App. 18a-30a) are unreported.

## JURISDICTION

The court of appeals entered its judgment on July 27, 1995. A timely petition for rehearing and suggestion for rehearing *en banc* was denied on September 6, 1995 (App. 17a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

12 U.S.C. § 1441a(*l*)(1) and 1441a(*l*)(3)(A) (Supp. V 1993) govern the removal of state-court actions involving the Resolution Trust Corporation ("RTC") and provide in relevant part:

> (*l*) **Power to remove; jurisdiction**
>
> **(1) In general**
>
> Notwithstanding any other provision of law, any civil action, suit, or proceeding to which the [RTC] is a party shall be deemed to arise under the laws of the United States, and the United States district courts shall have original jurisdiction over such action, suit, or proceeding.
>
> * * *
>
> **(3) Removal and remand**
>
> **(A) In general**
>
> The [RTC], in any capacity and without bond or security, may remove any action, suit, or proceeding from a State court to the United States district court with jurisdiction over the place where the action, suit, or proceeding is pending, to the United States district court for the District of Columbia, or to the United States district court with jurisdiction over the principal place of business of any institution for which the [RTC] has been appointed conservator or receiver if the action, suit, or proceeding is brought against the institution or the [RTC] as conservator or receiver of such institution . . . .

Kans. Stat. Ann. § 60-522, which took effect on July 1, 1993, provides in full:

> **60-522. Limitations on actions brought by or on behalf of the Kansas public employees retirement system; retroactive application.**
>
> **(a)** Notwithstanding any other limitations contained in article 5 of chapter 60 of the Kansas Statutes Annotated, any civil action brought by, or on behalf of, the Kansas public employees retirement system shall be brought within 10 years of the time in which such cause of action shall have accrued.
>
> **(b)** The provisions of this section shall be part of and supplemental to the provisions of article 5 of chapter 60 of the Kansas Statutes Annotated.
>
> **(c)** The limitations set forth in subsection (a) are to be construed and applied retroactively.

## STATEMENT OF THE CASE

This lawsuit was filed in Kansas state court on June 5, 1991, by the Attorney General of the State of Kansas on behalf of the Kansas Public Employees Retirement System ("KPERS"), the State's agency responsible for maintaining and investing its employees' retirement monies. The lawsuit was brought to recover $65 million, plus interest, that KPERS lost as the result of alleged fraud and other tortious conduct against KPERS in connection with its 1986 investment in a Missouri-based savings and loan named Home Savings Association. KPERS sued respondents, the former directors of Home Savings, for allegedly making fraudulent misrepresentations to KPERS to induce KPERS to make its disastrous $65 million investment in Home Savings. KPERS also sued a variety of other defendants (including KPERS' former investment advisor, accounting firm and law firm). *See* App. 3a.

On March 17, 1992, respondents moved in the Kansas state court to dismiss KPERS' claims on statute-of-limitations grounds, asserting that KPERS had made its Home Savings investment in a proprietary capacity, that the ordinary statutes of limitation therefore

applied to KPERS,[1] and that all of KPERS' claims were barred by the two- and three-year statutes of limitation for tort actions and statutory actions. *See* K.S.A. §§ 60-512, 60-513.

While respondents' motion was pending, the Kansas legislature enacted K.S.A. § 60-522, creating a new ten-year statute of limitations for actions brought by KPERS (L. 1992, ch. 321, S. 21, signed into law on May 22, 1992). App. 3a, 13a. However, the legislature did not at first direct that Section 60-522 be applied retroactively, and the state trial judge ignored the provision in ruling on respondents' motion. On August 21, 1992, the state trial judge issued an exhaustive opinion rejecting respondents' motion on the ground that, under Kansas law, KPERS had made the Home Savings investment in a governmental capacity, and hence that no statute-of-limitations period applied to KPERS' claims against respondents, so that all the claims were timely.

Shortly after losing their statute-of-limitations motion in Kansas state court, respondents filed a third-party petition against Home Savings' receiver, the Resolution Trust Corporation (RTC), alleging that the RTC had negligently mismanaged Home Savings and had lost money that could have been used to repay part of KPERS' losses, and also seeking indemnification under 12 C.F.R. § 545.121. Respondents' petition was ultimately dismissed as unmeritorious for failure to state a claim, *see* App. 23a-24a, but not before the RTC predictably invoked 12 U.S.C. § 1441a(*l*)(3)(A) to remove the entire case to federal court. The RTC chose, among the three available venues for removal (see p. 1, *supra*), the district where Home Savings had its principal place of business, the Western District of Missouri.

Respondents then immediately moved for a second time, on November 25, 1992, to dismiss the case as time-barred, this time advancing "the theory that KPERS' claims against them were barred under the Missouri law of limitations, which they argue[d] became

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[1] Under Kansas common law, a governmental entity such as KPERS is not generally subject to any statute of limitations. *E.g.*, *State ex rel. Stephan v. GAF Corp.*, 747 P.2d 1326 (Kan. 1987). By statute, Kansas has limited this rule to circumstances in which the entity is engaged in a governmental, as opposed to a proprietary, function. K.S.A. § 60-521.

the applicable law at the time the RTC removed the case to the Missouri federal court." App. 3a. Respondents admitted that they "d[id]n't know of anything" in "the statutory scheme that [they] would point to that would suggest that Congress intended to give the RTC the right to choose the procedural law that would be applicable to the case,"[2] but nevertheless insisted that the district court was required to apply, as the law of the "forum" state, Missouri's five-year limitation period for fraud actions, regardless of whether a longer limitation period would have controlled under Kansas law had the case remained in Kansas.[3]

The district court rejected respondents' argument that a change in venue pursuant to 12 U.S.C. § 1441a(*l*)(3)(A) should bring about a change in the applicable state-law statute of limitations, App. 22a-23a, deciding that "the applicable statute of limitations is the statute of limitations that would have applied in the state where the case was filed originally." App. 27a; *see also* App. 30a. The district court viewed this approach as required under this Court's decisions in *Van Dusen v. Barrack*, 376 U.S. 612 (1964), and *Ferens v. John Deere Co.*, 494 U.S. 516 (1990), which declined to construe 28 U.S.C. § 1404(a)'s general venue transfer provision as permitting such changes in the law applicable to a case.

Two aspects of *Van Dusen* and *Ferns* were paramount in the district court's decision to apply the law of the original forum. First was the need to "produce[] the kind of predictability" that "is important in an orderly system of dispute resolution": without such a rule, "if the statute of limitations is to be determined by the accident of who is made a third-party defendant or the accident of whether the RTC is made a third-party defendant, and by the further accident or exercise of discretion by the RTC of where the case should go, the plaintiff has no reasonable way of adjusting its

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[2] Transcript of Proceedings, June 2, 1994, at 17.

[3] According to respondents' counsel: "The case was filed in Kansas, but when it gets removed, it's like a brand-new case. You are not — for instance, you are not bound by anything that has happened in the case prior to the time that it lands in your court. When it lands in your court, it's a brand-new case in which you have original jurisdiction over." *Id.* at 20.

conduct in the sense of when a lawsuit is filed to any known statute of limitations." App. 27a-28a.

Second was the need, emphasized in *Ferens*, to "preserve[] that part of our system which allows plaintiffs to forum shop." App. 28a. As the district court explained, it would be

> a big step to put that ability to forum shop in the hands of the defendants, and particularly in the hands of a third-party defendant, in other words, for the third-party defendant to be able to pick the procedural rules that will apply, particularly the statute of limitations.
>
> If Congress had intended for the RTC to be able to do that, I believe Congress, because of the significance of that, of allowing defendant to choose the statute of limitations that would apply, Congress should have spoken with a great deal more clarity than it did.

App. 28a. Rather, the district court found it more sensible to construe Section 1441a(*l*)(3)(A) as simply designed "to allow the RTC to pick the forum that it believed was the most convenient to litigate in." App. 29a. Further, the district court stated that "the language of *Ferens* that the *Erie* rule remains a vital expression of the federal system and the concomitant integrity of the separate states, supports, I believe borrowing, utilizing the statute of limitations in the state of Kansas." App. 29a; *see also* App. 5a.

The district court also rejected out of hand respondents' further argument that, even looking directly to Kansas law, KPERS should not be permitted to rely on K.S.A. § 60-522, the special ten-year statute of limitations explicitly made applicable to all lawsuits brought by KPERS.[4] App. 19a, 22a-23a. In their Missouri federal court statute-of-limitations motion filed on November 25, 1992, respondents observed that Section 60-522 was enacted after the standard two- and three-year statutes of limitation had arguably run

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[4] This argument became relevant when the district court reexamined, and rejected, the Kansas state trial judge's finding under Kansas law that KPERS' decision to invest $65 million in Home Savings was a governmental function rather than a proprietary function. *See* Transcript of Proceedings, Apr. 28, 1994, at 40-41; App. 19a.

as to KPERS, and argued that Section 60-522 did not apply to KPERS' claims "because the legislature had not expressed an intent to revive barred actions." App. 13a. Several months later, the legislature amended Section 60-522 to state that the special new ten-year limitation period is "to be construed and applied retroactively." K.S.A. § 60-522(c). This amendment became effective on July 1, 1993, and the district court ruled on respondents' motion a year later.

In the district court's view, a finding that the statute of limitations was satisfied was required by the holding of the Kansas Supreme Court in *Harding v. K.C. Wall Products, Inc.*, 831 P.2d 958, 968 (Kan. 1992), that "[t]he legislature has the power to revive actions barred by a statute of limitations if it specifically expresses its intent to do so through retroactive application of a new law." Critical to the district court's reasoning on this point was its explicit recognition that to accept respondents' argument that even more specific language was necessary would render the Kansas legislature's retroactivity amendment a nullity:

> The rule in Kansas, as stated by the [Kansas Supreme] Court earlier in the *Harding* decision, is that the legislature has the power to revive actions barred by a statute of limitations if it specifically expresses the intent to do so through retroactive application of a new law.
>
> In order for the word "retroactive" to have any meaning, it must apply to cases where the statute of limitations had already run[, b]ecause the new statute of limitations would automatically run where the old statute had not already run. Therefore retroactive must be the same as revival and demonstrates the Kansas legislature's desire and intent to revive.
>
> That is certainly supported by the express words used by the Supreme Court of Kansas, "The legislature can revive actions barred by statutes of limitations if it expressly — if it specifically expresses the intent to do so through," and I emphasize, "retroactive application of a new law."
>
> Because the statute of limitations in question is said to be retroactive, it has the effect of reviving barred claims and

> therefore the HSA defendants' argument that that is not the effect of the statute is rejected.

Transcript of Proceedings, Apr. 28, 1994, at 112-13. Pursuant to 28 U.S.C. § 1292(b), respondents were then permitted to take an interlocutory appeal from the district court's denial of their renewed statute-of-limitations motion. App. 6a.

The court of appeals reversed on both issues. On the proper construction of 12 U.S.C. § 1441a(*l*)(3) in light of the principles laid down by *Van Dusen* and *Ferens*, the court of appeals conceded that there was no evidence that Congress intended to cause a change in law in cases removed under Section 1441a(*l*)(3) to a district court in a different State and, indeed, that "nothing in th[e] legislative history indicates that Congress devoted any attention to the issue of choice of law upon removal." App. 9a. The court of appeals also acknowledged that it had "located no helpful legislative history" at all on the provision, and could "only surmise that the purpose of amending" the provision in 1991 to add venue options other than the District of Columbia "may have been to relieve overcrowding in the District of Columbia district," especially given the RTC's complaints about the "'absurd' and inconvenient" nature of routine resort to the District of Columbia forum. App. 9a (citation omitted).

Nevertheless, rather than applying a presumption from *Van Dusen* and *Ferens* that a change in courthouse should not create a change in applicable state law, the court of appeals held that because Section 1441(a)(*l*)(3) was "passed at the height of a national crisis" and was intended to help the RTC, it should be construed to "let[] the RTC control the choice of law," rather than the plaintiff. App. 12a. Thus, the court of appeals held "that the limitations law of the forum state, Missouri, must govern this case," App. 12a, thus imposing an absolute limitations cap of five years on KPERS' claims, regardless of the content of present or future Kansas law.

Likewise, the court of appeals held that the ten-year statute of limitations set out in K.S.A. § 60-522 to govern all actions brought by KPERS does not apply to this case. The court of appeals acknowledged that after respondents in this case filed their motion calling into question the retroactivity of Section 60-522, the legislature specifically directed that the new ten-year provision must

be "construed and applied retroactively." Section 60-522(c). *See* App. 13a-14a. But the court of appeals refused to construe and apply the statute retroactively to cases arguably time-barred (but not yet final) on July 1, 1993, the enactment date of the amendment, on the basis that the legislature had not used the words "shall revive."[5]

## REASONS FOR GRANTING THE WRIT

In its construction of both 12 U.S.C. § 1441a(*l*)(3) and K.S.A. § 60-522 the Eighth Circuit has flouted basic principles laid down by this Court that are essential to safeguard the integrity and consistent application of state law in our complex federal judicial system, and particularly to minimize the substantive impact of inter-court transfers in cases involving state-law issues. This Court should grant certiorari to safeguard these basic principles of federalism threatened by the decision below.

**1.** The first question presented is certworthy for several reasons.

The first reason is broadly jurisprudential: this Court needs to clarify the precedential force of its decisions in *Van Dusen v. Barrack*, 376 U.S. 612 (1964), and *Ferens v. John Deere Co.*, 494 U.S. 516 (1990). Do these decisions involve merely a narrow construction of the general venue transfer statute, 28 U.S.C. § 1404(a), as the Eighth Circuit has held? Or was the district court correct (see pp. 4-6, *supra*) in reading *Van Dusen* much more broadly? In KPERS' view, *Van Dusen* should be read as establishing a baseline presumption that, unless the text or legislative history requires a contrary conclusion, all statutes authorizing inter-court changes of venue, not just Section 1404(a), must be construed to "allow plaintiffs to retain whatever advantages may flow from the state law of the forum they have initially selected," to prevent defendants from "defeat[ing] the advantages accruing to plaintiffs who have chosen . . . a proper venue," and

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[5] These particular words had been used by the Kansas legislature two years earlier in a separate statute that dealt largely with asbestos cases that had already suffered final judgments on statute-of-limitations grounds, the statute which the Kansas Supreme Court considered in *Harding*. App. 14a-15a.

thus to avoid "the rather startling conclusion that one might 'get a change of law as a bonus for a change of venue.'" *Van Dusen*, 376 U.S. at 633-34, 636 (citation omitted).

*Van Dusen* plainly did not rest on policy considerations peculiar to Section 1404(a) venue transfers. Rather, the *Van Dusen* Court relied centrally on the broad policy concerns underlying *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), *see* 376 U.S. at 637-39, concluding that to allow the law of the transferee district to control would undermine "the critical identity to be maintained" under *Erie* "between the federal district court which decides the case and the courts of the State in which the action was filed." *Id.* at 639.[6] Applying these principles, Justice Scalia has suggested that as a general rule of statutory construction it should be assumed, "when it is fair to do so, that Congress is just as concerned as [this Court] has been to avoid significant differences between state and federal courts in adjudicating claims," so that "in deciding whether a federal procedural statute or Rule of Procedure encompasses a particular issue, a broad reading that would create significant disuniformity between state and federal courts should be avoided if the text permits." *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22, 37-38 (1988) (Scalia, J., dissenting).

An even broader reading of *Van Dusen* and *Ferens* — and one utterly contrary to the analysis of the Eighth Circuit below — was articulated recently by the Seventh Circuit in *Eckstein v. Balcor Film Investors*, 8 F.3d 1121 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 883 (1994), which considered the statute of limitations applicable to cases filed under the Securities and Exchange Act of 1934 and

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[6] *See also Ferens*, 494 U.S. at 526 ("Applying the transferee law . . . would undermine the *Erie* rule in a serious way."); *id.* at 527 (*Van Dusen* "sought to fashion a rule that would . . . not create an opportunity for obtaining a more favorable law by selecting a forum through a transfer of venue"); *id.* at 534 (Scalia, J., joined by Brennan, Marshall and Blackmun, JJ., dissenting) (*Van Dusen* "rested upon the fact that the law grants the plaintiff the advantage of choosing the venue in which his action will be tried, with whatever state-law advantages accompany that choice," and that "the policies of *Erie* and *Klaxon [v. Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941),] would be undermined by application of the transferee court's choice-of-law principles in the case of a defendant-initiated transfer").

transferred under both 28 U.S.C. §§ 1404(a) and 1407. *Id.* at 1123-24. In his opinion for the court in *Eckstein*, Judge Easterbrook rejected the view taken by the Second Circuit in *Menowitz v. Brown*, 991 F.2d 36, 40 (2d Cir. 1993), that "*Van Dusen* and *Ferens* apply only in diversity cases," holding:

> Although both of those cases arose under the diversity jurisdiction, their references to *Erie* do not imply a ruling limited to state law. *Erie* is itself part of national law, interpreting the Rules of Decision Act, 28 U.S.C. § 1652. *Van Dusen* and *Ferens* accordingly apply whenever different federal courts properly use different rules. *Erie* is not unique in requiring federal courts to apply disparate norms.

*Id.* at 1127 (citation omitted).

Citing as examples the existence of 42 U.S.C. § 1988, "which leads federal courts to use state law as the basis of a federal period of limitations," and the "law of federal contracts, which is largely borrowed from state law," the *Eckstein* decision established a flat rule that "[w]hen the law of the United States is geographically non-uniform, a transferee court should use the rule of the transferor forum in order to implement the central conclusion of *Van Dusen* and *Ferens*: that a transfer under § 1404(a) accomplishes 'but a change of courtrooms.'" *Id.* (quoting *Van Dusen*, 376 U.S. at 639) (citations omitted).

The reasoning adopted by the Seventh Circuit in *Eckstein*, and by Justice Scalia in *Stewart Organization*, plainly supports the view that in construing statutes *other than* Section 1404(a) that also call for venue changes, the broad principles underlying *Van Dusen* require use of the law of the original forum where the law of the United States is geographically non-uniform. For example, nearly a decade ago, in *In re Korean Air Lines Disaster*, 829 F.2d 1171,1175-76 (D.C. Cir. 1987), then-Judge Ginsburg observed (in dictum) that in the context of inter-court transfers of diversity cases under 28 U.S.C. § 1407 "for coordinated or consolidated pretrial proceedings," *Van Dusen* would require a multidistrict judge "to apply divergent state positions on a point of law" in the different cases, depending on each plaintiff's original choice of venue. Recently, a district judge in the District of Columbia took exactly

that approach, explicitly adopting the analysis in *Eckstein* and construing Section 1407 to require him to apply the differing statutes of limitations of at least a half dozen transferor fora, rather than permit a change in the applicable limitations law based on the change in venue. *In re United Mine Workers of America Employee Benefit Plans Litigation*, 854 F. Supp. 914, 919-22 (D.D.C. 1994) (noting "fundamental disagreement" between the Second and Seventh Circuits over the meaning of *Van Dusen*).

The decision of the Eighth Circuit to read *Van Dusen* as merely setting out choice-of-law rules that "are unique to cases under" Section 1404(a), App. 10a, is somewhat consistent with the Second Circuit's decision in *Menowitz*, but it is flatly contrary to the fundamental principles recognized in *Van Dusen* itself and in *Ferens*, *Eckstein*, *In re Korean Air Lines Disaster* and *In re United Mine Workers*. The existing conflict in the lower federal courts over the fundamental meaning of *Van Dusen* and its application to non-Section 1404(a) cases is worthy of this Court's immediate attention.

Apart from the importance of resolving the basic meaning of *Van Dusen*, a failure to review the decision below would create two serious practical problems for the large amount of ongoing and future litigation involving, or with the potential to involve, the RTC.

First, even if this Court were inclined to *agree* with the Eighth Circuit's crabbed reading of *Van Dusen*, and to endorse its construction of Section 1441a(*l*)(3)(A), immediate review of the issue would be warranted if only to ensure that parties engaged in RTC-related litigation can count on a uniform nationwide rule. To date, all three circuits other than the Eighth Circuit that have addressed the nature of Section 1441a(*l*)(3)(A) — the First, Third and Fifth Circuits — have regarded it as a removal venue provision that merely grants the RTC a choice of three federal venues when it becomes a party to state-court litigation; none have suggested in any way that it confers on the RTC the power to affect the applicable law.[7]

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[7] *See Resolution Trust Corp. v. Nernberg*, 3 F.3d 62, 64-66 (3d Cir. 1993) (noting that the RTC "reads the statute as one establishing a broad venue," and that it was "enacted in haste at the end of the [congressional] session in November, 1991, with little explanatory history . . . to add a third venue site to which removal was permissible," to eliminate the "burdensome paper shuffling" involved with removal to the District of Columbia, followed

The construction of Section 1441a(*l*)(3)(A) adopted below, as the district court observed (see pp. 4-5, *supra*), even if uniformly followed would produce enormous unpredictability. Plaintiffs would be forced to make critical litigation decisions (such as when to file a lawsuit) based on guesswork regarding whether one or more defendants might name the RTC as a third-party defendant, regarding the forum to which the RTC would likely remove the case, and regarding what changes in the law applicable to the case would result from removal to that forum. If plaintiffs were forced to factor in circuit-by-circuit variations on whether the Eighth Circuit's construction of Section 1441a(*l*)(3)(A) is followed, litigation potentially affecting the RTC would turn into the jurisdictional analog of three-dimensional chess, making coherent planning virtually impossible. Prompt review by this Court to settle the meaning of Section 1441a(*l*)(3)(A) will guarantee that much of the current unpredictability will be resolved. Obviously, this Court's adoption of the view taken by the First, Third and Fifth Circuits would eliminate this unpredictability entirely.

Second, immediate review is warranted to resolve another serious practical problem: assuming that this Court would be inclined to reject the Eighth Circuit's construction of Section 1441a(*l*)(3)(A), until this Court overturns that construction the RTC will be a target for meritless third-party actions brought by defendants primarily, and perhaps solely, for the purpose of obtaining more favorable law in a different forum (see, e.g., p. 3, *supra)*. Obviously, the prospect that a defendant "might 'get a change of law as a bonus for a change of venue,'" *Van Dusen*, 376 U.S. at 636 (citation omitted), is a powerful incentive to use Section 1441a(*l*)(3)(A) as a forum-shopping device. As the district court observed (see p. 5, *supra*), there is no evidence that Congress meant to authorize such forum-shopping in enacting this provision.

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by transfer under 28 U.S.C. § 1404(a)); *see also Matter of 5300 Memorial Investors, Ltd.*, 973 F.2d 1160, 1163 (5th Cir. 1992) (construing Section 1441a(*l*)(3)(A) and its predecessor as "concerning solely venue and not jurisdiction"); *Sweeny v. Resolution Trust Corp.*, 16 F.3d 1, 3 n.4 (1st Cir. 1994) (per curiam) (panel including Breyer, J.) (noting concession that Section 1441a(*l*)(3)(A) "is a venue not a jurisdictional statute," and favorably citing *Matter of 5300 Memorial Investors, Ltd.* on this point).

2. A grant of certiorari, followed by a summary reversal on the merits pursuant to Sup. Ct. Rule 10.1(a) and 28 U.S.C. § 2106, is warranted on the second question presented, concerning the Eighth Circuit's decision to disregard, and thus render a nullity, the Kansas legislature's express directive in K.S.A. § 60-522(c) that the new ten-year statute of limitations applicable to actions by KPERS is "to be construed and applied retroactively." See pp. 2, 5-6, *supra*.

Although this Court ordinarily declines to review, "save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts," *Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944), this is an exceptional case. Here, the Eighth Circuit has failed, on a matter of enormous importance to the government of the State of Kansas, to discharge its duty to construe Kansas law as would the Supreme Court of Kansas. *See King v. Order of United Commercial Travelers of America*, 333 U.S. 153 (1948). It has been clear under Kansas law since at least 1862 that an amended statute of limitations, without any retroactivity language at all, automatically applies to claims that have accrued but have not yet been barred. *See, e.g., Stevenson v. City Council*, 781 P.2d 689, 691-93 (Kan. 1989); *Eakes v. Hoffman-LaRoche, Inc.*, 552 P.2d 998, 1000-02 (Kan. 1976); *Elliot v. Lochnane*, 1 Kan. 126 (1862). This settled precedent compels the conclusion, as the district court held (see p. 6, *supra*), that "[i]n order for the word 'retroactive' [in K.S.A. § 60-522(c)] to have any meaning, it must apply to cases where the statute of limitations had already run" (as respondents argue was true here for KPERS, on Section 60-522(c)'s effective date of July 1, 1993).

In applying Section 60-522(c)'s retroactivity provision *only* to actions that *were not* barred as of July 1, 1993 (*see* App. 15a), as to which Section 60-522(a) had already extended the limitations period and Section 60-522(c) was immaterial, the Eighth Circuit plainly rendered Section 60-522(c) a nullity, violating settled principles of Kansas law. *See, e.g., Todd v. Kelly*, 837 P.2d 381, 385 (Kan. 1992) ("presumption that the legislature does not intend to enact useless or meaningless legislation"); *State v. Keeley*, 694 P.2d 422, 426 (1985) (judicial interpretation must "give life to the statute rather than . . . nullify it"). The exercise of this Court's supervisory power to reverse the Eighth Circuit's decision is thus necessary to vindicate important principles of federalism and of Kansas law.

## CONCLUSION

For all these reasons, certiorari should be granted.

Respectfully submitted,

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December 5, 1995

## TABLE OF APPENDICES

APPENDIX A
Decision of the United States Court of Appeals for the Eighth Circuit, dated July 27, 1994 . . . . . 1a

APPENDIX B
Order of the United States Court of Appeals for the Eighth Circuit, denying petition for rehearing and rehearing *en banc*, dated September 6, 1995 . . . . . 17a

APPENDIX C
Order of the United States District Court for the Western District of Missouri, dated May 3, 1994 . 18a

APPENDIX D
Order of the United States District Court for the Western District of Missouri, dated June 13, 1994 . . . . . 22a

APPENDIX E
Excerpt of transcript of proceedings in the United States District Court for the Western District of Missouri, dated June 2, 1994 . . . . . 26a

# APPENDIX A

***In the***
***UNITED STATES COURT OF APPEALS***
***For the Eighth Circuit***

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No.94-3063

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KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM,
*Plaintiff -Appellee*,

v.

REIMER & KOGER ASSOCIATES, INC., a Kansas corporation; RONALD REIMER, an individual; KENNETH H. KOGER, an individual; CLIFFORD W. SHINSKI, an individual; BRENT MESSICK, an individual; ROBERT CREW, an individual;
*Defendants*,

FRANK MORGAN, an individual; SHERMAN DREISESZUN, an individual; LELAND GERHART, an individual; I. I. OZAR, an individual; RAYMOND GIFFORD, an individual; HARRY S. JONAS, an individual; RALPH E. KIENE, an individual; RANDALL M. NAY, an individual;
*Defendants - Appellants*,

FRANK SEBREE, an individual;
*Defendant*,

TONY SALAZAR, an individual; PHILIP PISTILLI, an individual;
*Defendants - Appellants*,

MICHAEL K. RUSSELL, an individual; GAGE & TUCKER, a law partnership; PEAT, MARWICK, MITCHELL & CO., an accountancy firm; KPMG PEAT MARWICK, an accountancy firm; ROBERT SPENCE,
*Defendants*,

FRANK MORGAN; SHERMAN DREISESZUN; LELAND GERHART; I. I. OZAR; RAYMOND GIFFORD; RALPH E. KIENE; RANDALL M. NAY; TONY SALAZAR; PHILIP PISTILLI,

*Third-party plaintiffs,*

RESOLUTION TRUST CORPORATION,

*Third-party defendant.*

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Appeal from the United States District Court
for the Western District of Missouri

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October 12, 1994, Argued, Submitted,
San Francisco, California

July 27, 1994, Filed

Before: McMillian, Circuit Judge, John R. Gibson, Senior Circuit Judge, and Hansen, Circuit Judge.

JOHN R. GIBSON, Senior Circuit Judge.

The former directors of Home Savings Association, a savings and loan now in receivership, appeal from a district court order denying their motion for summary judgment on the claims of Kansas Public Employees Retirement System, a creditor of Home Savings. The directors argue that KPERS' claims are barred by the statute of limitations. The district court held that Kansas limitations law applied, that the relevant Kansas statute of limitations, Kan. Stat. Ann. § 60-522 (1994), was ten years, and that the claims were not time-barred. We reverse.

KPERS sued the former Home Savings Association directors,[1] alleging common law fraud and other torts and violations of the Kansas Securities Act in connection with KPERS' 1986 purchase of $65 million in debentures from Home Savings. After Home Savings was placed in receivership in March 1991, KPERS filed suit in state court in Kansas, joining the directors as defendants in December 1991. KPERS claimed, among other things, that the directors made misrepresentations in selling KPERS the debentures. The directors impleaded the RTC, asserting that the RTC's negligence caused the debentures to become worthless *after* the RTC took over as receiver for Home Savings. Acting under special authority granted it in 12 U.S.C. § 1441a(*l*)(3) (Supp. V 1993), the RTC removed the case from the Kansas state court to the federal district court for the Western District of Missouri, Home Savings' principal place of business.[2]

The directors moved for summary judgment on the theory that KPERS' claims against them were barred under the Missouri law of limitations, which they argue became the applicable law at the time the RTC removed the case to the Missouri federal court, there being no applicable federal statute of limitations. The directors also argued that even if the law of Kansas should apply, the claims were still barred. At the time KPERS brought its suit, Kansas law prescribed a two-year statute of limitations for torts, Kan. Stat. Ann. § 60-513(a), and a three-year statute for statutory claims, Kan. Stat. Ann. § 60-512(2). While still in state court, the directors had moved to dismiss on the basis of the statute of limitations. The Kansas legislature promptly passed a ten-year statute of limitations applicable to civil actions brought by KPERS. Kan. Stat. Ann. § 60-522, L. 1992, ch. 321, S. 21. After the directors raised the

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[1] The directors taking this appeal are the Estate of Frank Morgan, Sherman Dreiseszun, Leland Gerhart, I. I. Ozar, Raymond Gifford, Harry S. Jonas, Estate of Ralph E. Kiene, Randall M. Nay, Tony Salazar, and Philip Pistilli. KPERS sued other defendants who are not parties to this appeal.

[2] In an earlier opinion we dealt with KPERS' unsuccessful attempt to have its case remanded to the Kansas courts. *Kansas Public Employees Retirement System v. Reimer & Koger Assoc.*, 4 F.3d 614 (8th Cir. 1993) (*KPERS I*), *cert. denied*, 128 L. Ed. 2d 862, 114 S. Ct. 2132 (1994).

argument that the new statute was inapplicable to causes that were already barred, the legislature amended the ten-year statute to provide that it should be "construed and applied retroactively." Kan. Stat. Ann. § 60-522(c), *as amended by* 1993 Kan. Sess. Laws ch. 227 (H.B. 2211). The directors argued that the added language was not sufficient to revive KPERS' lapsed claims. They also argued that the ten-year statute violated the Kansas Constitution and the federal Equal Protection clause.

Regarding the choice of law question, the district court considered the effect of 12 U.S.C. §§ 1441a(*l*)(1) and (3)(A).[3] Under section 1441a(*l*)(1), any suit to which the RTC is a party is "deemed to arise under the laws of the United States," and the district courts therefore have original jurisdiction over such suits. This grant of jurisdiction includes the entire suit, even though the RTC was only a third-party defendant. *KPERS v. Reimer & Koger*, 4 F.3d at 619, 620 (8th Cir. 1993) (*KPERS I*), *cert. denied*, 128 L. Ed. 2d 862, 114 S. Ct. 2132 (1994). Under section 1441a(*l*)(3)(A), the RTC can remove any action to which it is a party to its choice of three district courts: (1) the district with jurisdiction over the

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[3] Sections 1441a(*l*)(1) and 1441a(*l*)(3)(A) provide:

**(*l*) Power to remove; jurisdiction**

**(1) In general**

Notwithstanding any other provision of law, any civil action, suit, or proceeding to which the [RTC] is a party shall be deemed to arise under the laws of the United States, and the United States district courts shall have original jurisdiction over such action, suit, or proceeding.

. . .

**(3) Removal and remand**

**(A) In general**

The [RTC], in any capacity and without bond or security, may remove any action, suit, or proceeding from a State court to the United States district court with jurisdiction over the place where the action, suit, or proceeding is pending, to the United States district court for the District of Columbia, or to the United States district court with jurisdiction over the principal place of business of any institution for which the [RTC] has been appointed conservator or receiver if the action, suit, or proceeding is brought against the institution or the [RTC] as conservator or receiver of such institution . . . .

place where the case was pending before removal; (2) the district that was the principal place of business for the failed savings and loan in the case; or (3) the District of Columbia. The directors argued that whichever of these three districts the RTC chose became the "forum" for choice of law purposes. KPERS, on the other hand, argued that section 1441a(*l*)(3) is merely a venue provision, and that federal law dealing with change of venue retains the original place of filing as the "forum" for choice of law purposes.

The district court ruled in favor of KPERS, reasoning that to interpret section 1441a(*l*)(3) as permitting the RTC to select the "forum" for choice of law purposes from three possibilities would have three ill results, not intended by Congress. First, such an interpretation would make it impossible for the plaintiff to ascertain the applicable statute of limitations before filing suit. Second, the directors' interpretation would nullify the plaintiff's customary prerogative of choosing the forum, with the attendant control over choice of law. Finally, the directors' interpretation would frustrate one of the goals of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 817 (1938), by preventing Kansas state law from governing what are essentially Kansas causes of action. The district court concluded these ill results would be avoided by treating section 1441a(*l*)(3) as a venue provision, and therefore applied rules used in administering 28 U.S.C. § 1404(a) (1988), a change of venue statute. Under section 1404(a), state law causes of action transferred to a new venue take with them the statutes of limitation applicable in the transferor jurisdiction. *See Van Dusen v. Barrack*, 376 U.S. 612, 635-37, 11 L. Ed. 2d 945, 84 S. Ct. 805 (1964); *Ferens v. John Deere Co.*, 494 U.S. 516, 526, 108 L. Ed. 2d 443, 110 S. Ct. 1274 (1990). The district court considered this "look back" rule to be applicable to section 1441a(*l*)(3) cases, and therefore applied the statute of limitations of Kansas, the transferor jurisdiction.

The district court also held that under Kansas law, the ten-year statute was intended to revive KPERS' claims, and that the statute did not violate equal protection or the Kansas Constitution. The district court thus denied the directors' motion for summary judgment, holding that KPERS' claims were not time-barred.

The district court then dismissed the directors' claim against the RTC, reasoning that the RTC owed the directors no duty of care in its management of Home Savings, and therefore the directors could not sue the RTC for negligence. The directors moved for reconsideration, and the court granted the RTC permission to intervene for the limited purpose of responding to the directors' reconsideration motion. The district court then reaffirmed its earlier order dismissing the directors' third-party complaint.

Once the RTC was out of the suit, KPERS moved to remand the case to the state courts in Kansas. The district court denied the motion, retaining the case in exercise of the court's supplemental jurisdiction under 28 U.S.C. § 1367 (Supp. V 1993). The district court then certified the denial of summary judgment for interlocutory review under 28 U.S.C. § 1292(b)(1988), and this court granted permission to appeal.

## I.

In order to determine whether KPERS' claims are time barred, we must decide the threshold choice of law question. According to the directors, the choice of law analysis is utterly simple: this is a removal case; in removal cases not governed by a federal statute of limitations, federal courts apply the limitations laws of the forum; therefore, Missouri limitations law governs this case. KPERS responds that 12 U.S.C. § 1441a(*l*)(3) really presents a unique hybrid procedure--part removal and part change of venue. KPERS argues that we must invent new choice of law rules to deal with this situation by analogizing to the *Van Dusen-Ferens* doctrine developed in section 1404(a) change of venue cases, which (at least in state law cases)[4] retain the original forum's choice of law rules after transfer to a new venue.

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[4] There is some divergence of authority concerning whether the transferor district's choice of law can ever follow the case if the underlying cause of action arises under federal rather than state law. Compare *Menowitz v. Brown*, 991 F.2d 36 (2d Cir. 1993), with *Eckstein v. Balcor Film Investors*, 8 F.3d 1121 (7th Cir. 1993), *cert. denied*, 127 L. Ed. 2d 78, 114 S. Ct. 883 (1994).

Generally, in federal courts the limitations provisions of the forum state apply where the issue is not governed by federal statute. In diversity cases, this is because the forum state's limitations law governs, *see Guaranty Trust v. York*, 326 U.S. 99, 110-12, 89 L. Ed. 2079, 65 S. Ct. 1464 (1945), so that the issue is subject either to the forum's statute of limitations or the forum's borrowing statute. In a federal question case, where there is no federal statute of limitations, the federal court will borrow the forum state's limitations laws, if not inconsistent with federal law or policy. *See Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 355, 115 L. Ed. 2d 321, 111 S. Ct. 2773 (1991) (plurality) (if no federal statute, usual rule is to borrow "local" law); *Reed v. United Transp. Union*, 488 U.S. 319, 323-24, 102 L. Ed. 2d 665, 109 S. Ct. 621 (1989) (adopting "local" limitations period); *Burnett v. Grattan*, 468 U.S. 42, 48, 82 L. Ed. 2d 36, 104 S. Ct. 2924 (1984) (law of "forum"); *Cope v. Anderson*, 331 U.S. 461, 463, 91 L. Ed. 1602, 67 S. Ct. 1340 (1937) (applying borrowing statutes of forum state leads to ultimate application of statute from state where cause accrued); *Vanderboom v. Sexton*, 422 F.2d 1233, 1237 (8th Cir.) (forum state), *cert. denied*, 400 U.S. 852, 27 L. Ed. 2d 90, 91 S. Ct. 47 (1970).[5] *But cf. McGhee v. Ogburn*, 707 F.2d 1312, 1313 (11th Cir. 1983) (says that federal court borrows statute of state "in which suit is filed"; case was pending in same state as where filed); *Whatley v. Department of Educ.*, 673 F.2d 873 (5th Cir. 1982) (same).

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[5] We are aware of dictum in *Sanchez v. United States*, 49 F.3d 1329, 1330 (8th Cir. 1995) (per curiam), that the "limitations period for a section 1983 action is governed by the statute of limitations for personal injury actions in the state in which the claim *accrues*." This dictum conflicts with the Supreme Court precedent we have cited looking to the limitations law of the state where the case is pending, *supra*. The dictum is easily explained by the fact that the state where the cause accrued was also the state where the case was pending. Moreover, if the forum state has a borrowing statute, it may require the federal court to apply the limitations period from the state where the cause accrued, which may explain the language in *Sanchez*. *See, e.g., Cope*, 331 U.S. at 464-68. *See also Hawthorne v. Wells*, 761 F.2d 1514, 1515 n.7 (11th Cir. 1985) (federal law borrows limitations period from "state in which it sits"); *Hollander v. Brezenoff*, 787 F.2d 834, 837 (2d Cir. 1986) (same).

This case is a federal question jurisdiction case under 12 U.S.C. § 1441a(*l*)(1). Whether the applicable substantive law is derived from federal or state authority is a question we need not answer here, since there is no applicable federal statute of limitations and therefore state law will govern, whether in its own right or as a borrowed rule. *Cf. O'Melveny & Myers v. FDIC*, 129 L.Ed.2d 67, 114 S.Ct. 2048, 2053 (1994) ("Knowing whether 'federal law governs' in the *Kimbell Foods* sense--a sense which includes federal adoption of state-law rules--does not much advance the ball.") (citations omitted).

Therefore, if we view this case as an ordinary removal case, we must apply Missouri's limitations law, including its borrowing statute, Mo. Rev. Stat. §§ 516.190 (1994), if applicable. But, as KPERS argues, section 1441a(*l*)(3) differs from other removal statutes in that the general removal statutes permit only removal within the same jurisdiction. *See, e.g.*, 28 U.S.C. §§ 1441-1444 (1988 and Supp. V 1993). 12 U.S.C. section 1441a(*l*)(3), on the other hand, permits the RTC to choose among three possible removal fora: the district where the case was pending, the district where the failed thrift had its principal place of business, and the District of Columbia. This feature of section 1441a(*l*)(3) introduces a factor not present in cases arising under the general removal statutes: by its choice of where to remove the case, the RTC can choose the "forum." If we apply the ordinary federal choice of law rules, the removal can bring about a change in the choice of law. This alters the plaintiff's customary prerogative of controlling the choice of law in a way that is not apparent on the face of the statute. Therefore, KPERS argues, section 1441a(*l*)(3) should be treated as a change of venue statute, and we should apply the *Van Dusen-Ferens* "look back" rules developed in change of venue cases.

Our analysis begins with section 1441a(*l*)(3) itself, which gives the RTC the three choices of forum. Obviously, the statute uses the term "removal," and though it specifies three possible districts, it makes no mention of "venue."

The legislative history gives no direct guidance. Section 1441a(*l*)(3) was first enacted as part of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183 (1989). The statute originally permitted the RTC to remove only to the District of Columbia (or in cases arising out of the actions of the RTC with respect to an institution for which RTC had been appointed conservator, the district where the institution has its place of business). 103 Stat. 389-90. Neither the parties, the district court, nor this court have located any helpful legislative history showing whether Congress considered the choice of law ramifications of this provision. *See RTC v. Westgate Partners*, 937 F.2d 526, 530 (10th Cir. 1991) ("In the legislative history [of FIRREA], there is no evidence of Congressional intent whatsoever with regard to § 1441a(*l*)").

In the RTC Refinancing, Restructuring, and Improvement Act of 1991, Pub.L. No. 102-233, § 316, 105 Stat. 1772-73 (1991), Congress amended section 1441a(*l*)(3) to give the RTC more choices. In the 1991 Amendment Congress permitted the RTC to remove either to the District of Columbia or to the district in the place where the case was pending *or* to the district where the financial institution in question had its principal place of business. Again, we have located no helpful legislative history, and we can only surmise that the purpose of amending section 1441a(*l*)(3) may have been to relieve overcrowding in the District of Columbia district. *See RTC v. Davis*, 779 F. Supp. 181, 182 (D.D.C. 1991). Or, it may reflect the fact that the RTC, the intended beneficiary of the 1989 removal provision, considered it to be "absurd" and inconvenient. *See Westgate Partners*, 937 F.2d at 530. Nothing in this legislative history indicates that Congress devoted any attention to the issue of choice of law upon removal.

KPERS argues that the genesis of section 1441a(*l*)(3) shows that Congress cannot have intended the jurisdictions specified for removal to be the forum for choice of law purposes. The original version of the statute provided only for removal to the District of Columbia; KPERS argues that Congress cannot rationally have intended District of Columbia local law to govern all RTC removal

actions, and therefore we should not apply local law of the removal jurisdiction. This anomaly does not support KPERS' argument, because Congress arguably addressed the anomaly by amending the statute. The section now provides for removal to jurisdictions having a certain relation to the litigation. Therefore, the history of section 1441a(*l*)(3) leads just as easily to the conclusion that Congress discovered a problem with the section as originally enacted and corrected that problem to its satisfaction.

More generally, FIRREA and the RTC Refinancing Act of 1991 manifest an extreme concern with the savings and loan crisis and willingness to give the RTC broad powers in dealing with the crisis. *See generally* H.R. Rep. No. 101-54(I), 101ST Cong., 1st Sess. 294-312, 356-66 (1989), *reprinted in* 1989 U.S.C.C.A.N. 90-108, 152-62; H.R. Rep. No. 102-358(I), 102d Cong., 1st Sess. 33 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1384, 1389.

In the absence of any directive from Congress, we are not authorized to import a body of venue law derived from an entirely different statute into section 1441a(*l*)(3).[6] In *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 70 L. Ed. 2d 419, 102 S. Ct. 252 (1981), the Supreme Court held that the *Van Dusen* choice of law rules developed under section 1404(a) are unique to cases under that statute, and do not form any common law of venue applicable in non-section 1404(a) cases.

In *Reyno*, the Supreme Court applied the common law of *forum non conveniens* to a Pennsylvania case involving an air crash in Scotland, in which the decedents were all Scottish, as were their heirs and next of kin. The *Reyno* plaintiffs' only purpose in suing in the United States was to take advantage of more liberal products liability and wrongful death laws here. Transfer to Scotland was not

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[6] KPERS points to cases from other circuits referring to section 1441a(*l*)(3) as a venue provision, but these cases do not purport to apply section 1404(a) choice of law rules and are not relevant to our question. *See 5300 Memorial Investors, Ltd. v. RTC*, 973 F.2d 1160, 1163 (5th Cir. 1992); *Sweeney v. RTC*, 16 F.3d 1, 3 n.4 (1st Cir. 1994), *cert. denied*, 130 L. Ed. 2d 206, 115 S. Ct. 291 (1995).

available under section 1404(a), which only provides for transfer within the federal system, so the district court dismissed the case under the law of *forum non conveniens*. The Court of Appeals reversed, saying that under *Van Dusen* dismissal could never be appropriate where the law of the alternative forum was less favorable to the plaintiff than that of the forum where the plaintiff filed the suit. 454 U.S. at 244. The Supreme Court reinstituted the district court's judgment. The Court noted that the Court of Appeals had analogized from *Van Dusen* and the law of section 1404(a), but that reliance on *Van Dusen* is inappropriate in cases where section 1404(a) does not apply. 454 U.S. at 253.

When section 1404(a) was enacted, it made transfer from an inconvenient venue more available than dismissal had been at common law, and therefore made forum shopping by defendants a more common problem. Permitting the defendant to change the choice of law rules by using section 1404(a) transfer was an unanticipated byproduct of a statute that was meant as a "federal judicial housekeeping measure," *Van Dusen*, 376 U.S. at 636, and was not intended to change the balance of power between the parties. *Van Dusen* addressed that problem by developing the "look back" procedure whereby the transferee federal court could simply apply the transferor forum's law. *Id.* at 639. Therefore, *Reyno* said the *Van Dusen* holding should not be seen as bearing on the common law, but as involving concerns unique to the law of section 1404(a): "The [*Van Dusen*] rule was necessary to ensure the just and efficient operation of [section 1404(a)]." 454 U.S. at 254. We take *Reyno* as a caution against importing the *Van Dusen-Ferens* doctrine into a statutory scheme foreign to that which it was created to effectuate.

Moreover, *Reyno* discredits KPERS' argument that we cannot read section 1441a(*l*)(3) in such a way as to deprive a plaintiff of the "right" to select the applicable choice of law rules. The *Reyno* court did not consider this to be a sacrosanct privilege reserved to plaintiffs. "The deference accorded a plaintiff's choice of forum has never been intended to guarantee that the plaintiff will be able to select the law that will govern the case." 454 U.S. at 256 n.24.

*Reyno* explained *Van Dusen's* concern with this privilege as the desire to effectuate a particular statute, section 1404(a), not as acknowledging some fundamental right. Though "the plaintiff is normally master to decide what law he will rely upon," *BASF Corp. v. Symington*, 50 F.3d 555, 557 (8th Cir. 1995) (citation and internal quotation omitted), the rule is not invariable.

In contrast to section 1404(a), which was intended to be merely a "housekeeping" measure, section 1441a(*l*)(3) was part of FIRREA, a statute that was passed at the height of a national crisis and was intended to help resolve that crisis, partly through the instrumentality of the RTC. We would ignore *Reyno* if we relied on language from section 1404(a) cases emphasizing a plaintiff's privilege to select the forum and if we disregarded the apparent effect of section 1441a(*l*)(3) in permitting the RTC to choose its forum.

KPERS argues that permitting the RTC to control the selection of the forum would make the choice of law rules intolerably unpredictable. That argument depends on an implicit assumption that it is the *plaintiff's* ability to predict what the law will be that is of paramount importance. From the historical context and from the language of section 1441a(*l*)(3), it seems likely that Congress would have been more concerned with the *RTC's* ability to predict what the controlling law would be. This would be best served by letting the RTC control the choice of law.

We therefore reject KPERS' argument that section 1441a(*l*)(3) cases should be governed by the *Van Dusen-Ferens* rule, and hold that the limitations law of the forum state, Missouri, must govern this case.

## II.

Under Missouri law, KPERS' cause of action will be subject to the five-year Missouri limitation period for fraud, Mo. Rev. Stat. § 516.120(5) (1994), unless "fully barred" by a shorter statute in

the state where the cause originated, Kansas.[7] Mo. Rev. Stat. § 516.190 (1994). The directors argue that KPERS' cause is barred under Kansas law because Kan. Stat. Ann. § 60-522, the ten-year statute, is inapplicable and therefore that the two and three year Kansas Statutes, Kan. Stat. Ann. §§ 60-512(2) and 60-513(a)(3) (1994), apply.

The directors argue that the Kansas ten-year statute of limitations does not apply to KPERS' case. When KPERS filed this lawsuit in December 1991 alleging fraud in a 1986 transaction, the applicable Kansas statutes were the two-year torts statute, Kan. Stat. Ann. § 60-513(a)(3), and the three-year statute for statutory claims, Kans. Stat. Ann. § 60-512(2). After the case was filed and the directors had raised the statute of limitations as a defense, the Kansas legislature enacted a new ten-year statute of limitations for actions by or on behalf of KPERS. Kan. Stat. Ann. § 60-522 (signed into law May 22, 1992). On November 25, 1992, the directors moved for summary judgment, arguing that the new ten-year statute did not apply because the legislature had not expressed an intent to revive barred actions. Effective July 1, 1993, the legislature amended the statute to add section (c). The KPERS limitations statute now provides:

> Limitations on actions brought by or on behalf of the Kansas public employees retirement system; retroactive application. (a) Notwithstanding any other limitations contained in article 5 of chapter 60 of the Kansas Statutes Annotated, any civil action brought by, or on behalf of, the Kansas public employees retirement system shall be brought within 10 years of the time in which such cause of action shall have accrued.
>
> (b) The provisions of this section shall be part of and supplemental to the provisions of article 5 of chapter 60

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[7] The directors agree that Kansas law will ultimately apply, since the directors urge us to apply the Kansas two and three year statutes via the Missouri borrowing statute, and KPERS has always taken the position that Kansas law applied. The result of applying the borrowing statute is just the same as if we applied Kansas law in its own right, as KPERS urges us to do.

of the Kansas Statutes Annotated.

(c) The limitations set forth in subsection (a) are to be construed and applied retroactively.

Kans. Stat. Ann. § 60-522.

KPERS contends that section 60-522 (c) is effective to revive its cause of action. The Kansas Supreme Court has recently considered whether the legislature may revive time-barred causes of action in *Harding v. K. C. Wall Prods., Inc.*, 250 Kan. 655, 831 P.2d 958 (Kan. 1992). *Harding* held that the legislature may constitutionally revive causes barred by statutes of limitation, but not those barred by statutes of repose. *Id.* at 968. *Harding* specifically held that the two-year statute, section 60-513(a), is a statute of limitations. *Id.* at 968. The directors do not dispute that section 60-512(2) is also a statute of limitations, not of repose. However, *Harding* required that in order to revive time-barred cases, the legislature articulate its intent plainly:

> The legislature has the power to revive actions barred by a statute of limitations if it specifically expresses its intent to do so through retroactive application of a new law.

*Id.*

The statute in the *Harding* case emphatically and specifically expressed the intent to revive lapsed claims. *Harding* quoted the statute, emphasizing key language:

> "Upon the effective date of this act through July 1, 1991, the provisions of this subsection *shall revive* such causes of action for latent diseases caused by exposure to a harmful material for: (1) Any person whose cause of action had accrued, as defined in subsection (d) on or after March 3, 1987 [the date of *Tomlinson v. Celotex Corp.*, 244 Kan. 474, 770 P.2d 825 (Kan. 1989); or (2) any person who had an action pending in any court on March 3, 1989, and because of the judicial interpretation of the ten-year limitation contained in subsection (b) of K.S.A. 60-513, and amendments thereto, as applied to

> latent disease caused by exposure to a harmful material the: (A) Action was dismissed; (B) dismissal of the action was affirmed; or (C) action was subject to dismissal. **The intent of this subsection is to revive causes of action** for latent diseases caused by exposure to a harmful material **which were barred** by interpretation of K.S.A. 60-513, and amendments thereto, in effect prior to this enactment." (Emphasis added.) K.S.A. 1991 Supp. 60-3303.

*Harding*, 831 P.2d at 963 (italics in statute added by *Harding*) (boldface added by this court). In marked contrast to the explicit language at issue in *Harding*, section 60.522(c) states that it should be "applied retroactively," but does not make any mention of intent to revive time-barred actions. This falls far short of what *Harding* requires. *Harding* was on the books at the time the Kansas legislature added section 60-522(c); we can only conclude that the legislature did not intend to revive lapsed actions, since it did not include the language the Kansas Supreme Court had so recently required as evidence of such an intent.

Moreover, it is possible to effectuate the retroactivity provision of section 60-522(c) by applying it retroactively to cases that have accrued but have not yet been barred. Once a case has become time-barred, it is necessary under *Harding* for the legislature to revive it by specific language. 831 P.2d at 968. Providing that a statute of limitations should be "applied retroactively" is a broad brush approach to what is actually a more specific inquiry. Retroactive application can reach two categories of cases: first, a group on which the statute has not run at the time the statute is amended; and second, cases on which the existing statute has run at the time of amendment. The second group is affected not only by questions of the retroactive application of the statute, but also by the need to consider the question of revival of barred claims. This the decision in *Harding* makes clear. *Harding* discusses in detail the differences between a statute of repose and a statute of limitations, and issues relating to reviving causes of action barred by a statute of limitations. In a case such as is before us, the statute

must, under the language and holding of *Harding*, address not only the issue of retroactivity, but revival as well. The statute before us did not do so.

We therefore reverse the district court's holding that the Kansas ten-year statute governs. Accordingly, we hold that the Missouri borrowing statute requires the district court to apply the Kansas two- and three-year statutes to KPERS' claims if the claims would be "fully barred" by these statutes (a finding of fact which has not been made). The directors do not ask that we determine "the ultimate limitations periods to be applied in this case and whether they bar KPERS' claims."

Our decision that section 60-522(c) does not revive causes of action that are barred makes it unnecessary that we reach the troublesome Kansas Constitution or federal equal protection arguments asserted by the directors.

We reverse and remand to the district court to determine whether KPERS' claims are time-barred under the applicable Kansas statutes.

## APPENDIX B

*In the*
*UNITED STATES COURT OF APPEALS*
*For the Eighth Circuit*

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No. 94-3063WMKC

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KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM,
*Appellee*,

v.

FRANK MORGAN, *et al.*,
*Appellants*.

**ORDER DENYING PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC**

Filed September 6, 1995

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

# APPENDIX C

## IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

| | | |
|---|---|---|
| KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM, *Plaintiff*, | ) | |
| v. | ) | |
| REIMER & KOGER ASSOCIATES, INC., *et al.*, *Defendants*. | ) | |
| | ) | No. 92-0922-CV-W-9 |
| FRANK MORGAN, et al., *Defendants and Third-Party Plaintiffs*, | ) | |
| v. | ) | Filed May 3, 1994 |
| RESOLUTION TRUST CORPORATION, *Third-Party Defendant*. | ) | |

**ORDER**

Third-party defendant Resolution Trust Corporation (RTC) has filed a Motion to Dismiss the Second Amended Petition filed by plaintiff Kansas Public Employees Retirement System (KPERS) and a Motion for a Stay. On October 22, 1993, defendants Morgan, Dreiseszun, Gerhart, Ozar, Gifford, Kiene, Nay, Salazar and Pistilli (the HSA defendants) filed a Renewed Motion for Summary Judgment on the claims asserted against them by

KPERS. On April 7, 1994, defendant Frank P. Sebree filed a Motion for Summary Judgement on the claims asserted against him by KPERS.

The parties presented oral arguments on the motions on April 28, 1994.

For the reasons stated on the record during the April 28, 1994, hearing, it is ORDERED that:

1) the RTC's Motion for a Stay filed November 5, 1992, is denied as moot;

2) the HSA defendants' Renewed Motion for Summary Judgment is granted in part in that the causes of action asserted by KPERS in this case arose out of a proprietary function or activity of KPERS, as opposed to a governmental function;

3) the HSA defendants' Renewed Motion for Summary Judgment is denied in part in that the recently enacted ten-year statute of limitations for claims brought by KPERS found in K.S.A. § 60-522 revives expired clauses of action regardless of whether KPERS "slept on its rights," does not violate the Equal Protection Clause of the United States Constitution and does not violate Article 2, Section 16 of the Kansas Constitution;

4) the remainder of the RTC's and HSA defendants' motions will be decided at the June 2, 1994 hearing, as well as the motions set forth in my order dated March 14, 1994;

5) on or before May 10, 1994, KPERS shall file an amended complaint meeting the following requirements:

a) each claim shall be set forth in a separate count;

b) in each count plaintiff shall state which defendant or defendants the claim is asserted against;

c) in each count plaintiff shall state the jurisdictional basis for the claim;

d) in each count plaintiff shall state the elements of the claim;

e) in each count plaintiff shall allege the facts KPERS believes satisfy each element of the claim;

f) in each count plaintiff shall state the proper measure of damages applicable to the claim with supporting authority;

g) in each count plaintiff shall allege the damages it is seeking that are consistent with the proper measure of damages and that plaintiff contends are the claimed damages flowing directly from the alleged wrongful acts;

h) the amended complaint shall contain any other allegations necessary to comply with federal pleading requirements;

6) on or before May 20, 1994, defendants shall respond to KPERS' amended complaint;

7) on or before May 30, 1994, KPERS shall reply to defendants' responses, if appropriate under the Federal Rules of Civil Procedure and the Local Rules of this court;

8) on or before May 13, 1994, each interested party shall file a brief on the following statute of limitations issues:

a) whether Missouri or Kansas supplies the choice of law rules for each claim asserted by KPERS. If the Kansas choice of law rules apply, what the choice of law rules are for Kansas and what state's statutes of limitation apply to the KPERS claims under the Kansas choice of law rules; and

b) if the applicable statute of limitations is the five year Missouri statute of limitations, whether that statute expired prior to KPERS bringing suit against the HSA defendants and Sebree;

9) on or before May 23, each interested party shall file a brief in response to the other parties' May 13, 1994, brief; and

10) if KPERS wishes to conduct discovery on the statute of limitations issue, it shall notify the other parties on or before May 9, 1994. If the parties cannot reach an agreement on discovery, the parties shall communicate no later than May 12, 1994, with Yvonne Johnson, courtroom deputy clerk (816-426-3810), and request a telephone conference with me.

D. BROOK BARTLETT
UNITED STATES DISTRICT JUDGE

Kansas City, Missouri

May 3, 1994

# APPENDIX D

## IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

| | | |
|---|---|---|
| KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM, *Plaintiff*, | ) | |
| v. | ) | |
| REIMER & KOGER ASSOCIATES, INC., *et al.*, *Defendants*. | ) | |
| | ) | No. 92-0922-CV-W-9 |
| FRANK MORGAN, *et al.*, *Defendants and Third-Party Plaintiffs*, | ) | |
| v. | ) | Filed June 13, 1994 |
| RESOLUTION TRUST CORPORATION, *Third-Party Defendant*. | ) | |

### ORDER

A hearing was held on June 2, 1994, with the parties presenting oral arguments on various pending motions. For the reasons stated on the record at the June 2, 1994, hearing, it is ORDERED that:

1) the HSA defendants' Renewed Motion for Summary Judgment filed October 22, 1993, is denied in part in that: a) the statute of limitations applicable to the causes of action asserted by

KPERS is the Kansas ten-year statute of limitations found in K.S.A. §60-522; and [b]) the causes of action asserted by KPERS were filed prior to the expiration of K.S.A. §60-522;

2) the RTC's Motion to Dismiss Second Amended Petition in Part filed November 5, 1992, the HSA defendants Renewed Motion for Summary Judgment filed October 22, 1993, defendant Sebree's Motion for Summary Judgment filed April 7, 1994, and the RTC's Motion to Dismiss, in Part, Third Amended Complaint filed May 20, 1994, are granted in part in that paragraph 105 of KPERS' Third Amended Complaint and those portions of paragraphs 106 and 107 that refer to "consequential damages" are stricken because: a) the claimed "consequential damages" are in effect damages shared by all shareholders which makes the claim for them the property of the RTC; and b) the approprate measure of damages does not include the "consequential damages" claimed;

3) whether other portions of KPERS' Third Amended Complaint should be stricken for the reasons stated in paragraph 2) will be determined at the June 30, 1994, hearing;

4) the remaining portions of the motions referred to in paragraph 2) are denied, except to the extent those motions were granted in my order issued May 3, 1994;

5) the RTC's Motion to Dismiss First Amended Third-Party Complaint, or in the Alternative, Motion for Summary Judgment filed October 21, 1993, KPERS' Renewed Motion to Strike Third-Party Claims filed February 23, 1994, and the RTC's Motion to Dismiss Reimer & Koger Associates, Inc. and Kenneth H. Koger's Third-Party Petition, or in the Alternative, Motion for Summary Judgment filed April 28, 1994, are granted in that the RTC does not owe a duty to the third-party plaintiffs and indemnification is not available under 12 C.F.R. § 545.121;

6) the third-party claims asserted by defendants Morgan, Dreisenszun, Gerhart, Ozar, Gifford, Kiene, Nay, Salazar and Pistilli against third-party defendant RTC are dismissed;

7) the third-party claims asserted by defendants Reimer & Koger Associates, Inc. and Kenneth H. Koger's against third-party defendant RTC are dismissed;

8) the schedule for presenting any motion to remand and for obtaining any opposition to such motion will be as follows:

a) any party wishing to file a motion to remand this case to the District Court of Shawnee County, Kansas, shall do so on or before June 13, 1994;

b) suggestions in opposition shall be filed on or before June 20, 1994;

c) reply suggestions shall be filed on or before June 24, 1994;

d) each party shall make sure that the other parties *receive* a copy of their brief on the same day it is filed;

e) please deliver a copy of each brief to chambers on the same day it is filed;

9) if the RTC wishes to file a motion to intervene, it shall do so by the deadline established in paragraph 8 a) above and any opposition shall be filed by the deadline established in paragraph 8 b) above;

10) with respect to paragraph 3) above:

a) any party wishing to argue that additional paragraphs should be stricken for the same reasons that portions of paragraphs 105-107 were stricken shall file a brief on or before June 13, 1994;

b) responses shall be filed on or before June 20, 1994;

c) replies shall be filed on or before June 24, 1994;

d) each party shall make sure that the other parties *receive* a copy of their brief on the same day it is filed;

e) please deliver a copy of each brief to chambers on the same day it is filed;

11) a hearing will be held on June 30, 1994, to discuss, in the following order: a) the RTC's motion to intervene, if filed; b) whether additional paragraphs of KPERS Third Amended Complaint should be stricken (*see* ¶¶ 3) and 10) above); and c) whether this case should be remanded to the District Court of Shawnee County, Kansas (*see* ¶ 8 above);

12) if this case is not remanded to the District Court of Shawnee County, Kansas, a hearing will be held on July 1, 1994, to discuss any motion that a party wants taken up, so long as all other parties and the court have been notified by letter mailed on or before June 20, 1994, that the motion should be included on that day's agenda. The letter shall refer to the title of the motion and the date it was filed.

D. BROOK BARTLETT
UNITED STATES DISTRICT JUDGE

Kansas City, Missouri

June 13, 1994.

# APPENDIX E

## IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

| | | |
|---|---|---|
| KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM, *Plaintiff*, | ) | |
| v. | ) | |
| REIMER & KOGER ASSOCIATES, INC., *et al.*, *Defendants*. | ) | |
| | ) | No. 92-0922-CV-W-9 |
| FRANK MORGAN, *et al.*, *Defendants and Third-Party Plaintiffs*, | ) | |
| v. | ) | Filed June 2, 1994 |
| RESOLUTION TRUST CORPORATION, *Third-Party Defendant*. | ) | |

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE D. BROOK BARTLETT,
UNITED STATES DISTRICT JUDGE

***[excerpt]***

**[46]** THE COURT: In searching for the statute of limitations which should be applied in this case, I believe one must start with the federal statute that led to this case being in the Court, 12

U.S.C. Section 1441, which is subparagraph 1, [which] does not give the answer. It does not state that procedural law should be applied where the RTC **[47]** exercises its removal power or right.

I have not had any legislative history called to my attention that would suggest what Congress might have intended with regard to the procedural law that would apply upon removal to a federal court in a state different from the state where the case was filed.

I note the language in 1441a(*l*)1 that the civil action is deemed to arise under the laws of the United States, and that the United States District Court shall have original jurisdiction over the action, but I don't find from that wording the answer to the question that we are asking. I don't find the answer directly from any other source.

Cases of first impression in the federal system almost by definition have to start at the District Court level, but I am very much aware of the fact that I am not a judge that makes policy. That's reserved to the courts of appeal and primarily to the Supreme Court of the United States.

That doesn't relieve for me, however, the responsibility of making a decision. To preserve my view of how the federal system works and my role in it, what I am going to say here is going to be couched initially in terms of my prediction of what the Eighth Circuit Court of Appeals would do with this issue, if it were the deciding court.

However, with that little caveat, as I said, I **[48]** have to make a decision, I can't send this problem elsewhere for a decision. Because I find no guidance directly from any statute or decided case, I determined that under the circumstances of this case the applicable statute of limitations is the statute of limitations that would have applied in the state where the case was filed originally.

Now, this rule for this case accomplishes two important goals that should be of concern and are of concern to the orderly resolution of disputes. First, it fosters predictability.

The plaintiff who must be concerned about the effect of a statute of limitations and must be able to identify the applicable statute of limitations will have a way to do so. If it weren't for this rule, the rule that I am adopting, if the statute of limitations is

to be determined by the accident of who is made a third-party defendant or the accident of whether the RTC is made a third-party defendant, and by the further accident or exercise of discretion by the RTC of where the case should go, the plaintiff has no reasonable way of adjusting its conduct in the sense of when a lawsuit is filed to any known statute oflimitations, without making a series of hypothetical assumptions that may or may not be applicable, for instance, the plaintiff would have to assume that under a worse case scenario somehow the RTC would get involved and **[49]** then they would have to assume well, the RTC gets involved, and the RTC has a choice of three places to remove the case to. The location that it could move it to that has the shortest statute of limitations is "x" and therefore we need to file our lawsuit in accordance with that statute of limitations.

I don't believe that that approach produces the kind of predictability that I believe is important in an orderly system of dispute resolution.

The second important goal that is accomplished by adopting the statute of limitatioins of the state where the case was originally filed, in this case, Kansas, is that it preserves that part of our system which allows plaintiffs to forum shop. The issue that was discussed in Ferens, the right of plaintiffs to decide where to file lawsuits, would be protected by my rule.

It seems to me that it is a big step to put that ability to forum shop in the hands of the defendants, and particularly in the hands of a third-party defendant, in other words, for the third-party defendant to be able to pick the procedural rules that will apply, particularly the statute of limitations.

If Congress had intended for the RTC to be able to do that, I believe Congress, because of the significance of that, of allowing defendant to choose the statute of **[50]** limitations that would apply, Congress should have spoken with a great deal more clarity than it did.

Now, I find support for the rule that I have announced in both the Van Dusen decision and in the Ferens decision. The reality of this litigation is that the claims asserted by the plaintiff against the defendants are characterized as state law claims. They are the type

of claims one would usually see in a diversity case.

Therefore, the language of Ferens that the Erie rule remains a vital expression of the federal system and the concomitant integrity of the separate states, supports, I believe borrowing, utilizing the statute of limitations in the state of Kansas.

I believe that under 1441a(*l*) it is fair to read from the removal right given to the RTC that one purpose Congress had, maybe the only, but at least one purpose, was to allow the RTC to pick the forum that it believed was the most convenient to litigate in.

Certainly, removal to the federal court of the state in which the case was originally filed could have a convenience, it could be the most convenient forum for the RTC or it could not be. So that particular option doesn't point, I believe, as clearly to convenience being part of Congress' intent as do the other two.

Removing it to the District of Columbia, seems to **[51]** me, to point rather strongly to the RTC's convenience. In other words, they can remove it to their home base if they want to. How much more convenient could that be to a party?

The next option is the third option, as to the jurisdiction over the principal place of business of any institution in which the RTC is involved. Again, that to me, suggests convenience as one reasonable basis for Congress choosing that as a possible location for the RTC to choose.

Because I believe that convenience is part of the purpose underlying the removal right the RTC has, and because of the claims again asserted by the plaintiff against the defendant are essentially state law claims, the principles discussed in Van Dusen and Ferens, both cases involving transfers under 1404a, support, I believe, the conclusion that I have reached.

In Van Dusen, the Supreme Court was concerned about the critical identity to be maintained between the Federal District Court which decides the case and the Courts of the state in which the action was filed. I find that language at 81 Supreme Court Reporter on page 639.

Now, one can approach part of this analysis in a different way, and that approach is dependent upon the language used by

Congress, that this civil action shall be deemed to arise under the laws of the United States. [52]

I certainly don't subscribe to the view, and I am not adopting the view that that language means that the claims asserted by the plaintiff against the defendant suddenly become federal claims, even though based, in one instance at least, on a state statute.

I do believe, however, that that language is intended to recognize that where the RTC is a party, where the rights of the RTC in carrying out the responsibilities that Congress has given the RTC may be at stake, that Congress believes that federal questions are involved because the carrying out of the RTC's mission could be at stake.

To the extent that there are federal claims involved, or there is a federal interest in this case, one would first search for the applicable statute of limitations. In federal law one would find none, I submit. And then one would look to borrow the closest, the most applicable statute of limitations from the forum state.

Now, all of the talk of forum state in this kind of case where you have removal and you have a federal question, has been in the context of applying or borrowing the statute of limitations from the state court in which the case was originally filed. And because the case was filed in the same state in which the federal court sits, the forum state is by definition that state. [53]

I submit that the considerations that led to originally adopting that rule are entirely carried out and furthered by borrowing the statute of limitations from the state in which this case was originally filed, Kansas.

Therefore, under that analysis, the Kansas statute of limitations would be borrowing. In any event, whatever rationale one uses, whatever approach one uses to determine the statute of limitations, I believe that it must be the statute of limitations for the state in which the case was filed, Kansas, so the applicable — the statute of limitations applicable to the state law claims asserted in this case will be the ten-year statute of limitations in the state of Kansas.